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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1740

LUBBOCK POSTER COMPANY,
Petitioner,

v.

THE CITY OF LUBBOCK, TEXAS, ET AL.,
Respondents.

Brief Of Respondents In Opposition To Petition For Writ Of Certiorari

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THE CITY OF LUBBOCK, TEXAS, ET AL.,
Respondents.

Brief Of Respondents In Opposition To Petition For Writ Of Certiorari

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TO THE UNITED STATES SUPREME COURT:

Respondents THE CITY OF LUBBOCK, TEXAS, A Home Rule Municipal Corporation of Lubbock County, Texas, JAMES E. BERTRAM, in his capacity as Director of Planning for the City of Lubbock, and JERREL D. NORTHCUTT, in his capacity as Zoning Administrator for the City of Lubbock, hereinafter called Respondents, submit this Brief in reply and in Opposition to Petitioner's PETITION FOR WRIT OF CERTIORARI to The Court of Civil Appeals for The Seventh Supreme Judicial District of Texas, and would respectfully show the following:

OPINION BELOW

The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, *Lubbock*

Poster Co. v. City of Lubbock, appears at 569 S.W.2d 935 (Tex.Civ.App. — Amarillo 1978, writ ref'd n.r.e.) A correct copy of this opinion is appended to Petitioner's Petition for Writ of Certiorari (APPENDIX A, pp. 4-22).

JURISDICTION

Petitioner has asserted jurisdiction under 28 U.S.C., §1257(3).

While this Court has potential jurisdiction of this case under the cited provision, there are compelling reasons against the granting of the Petition for Writ of Certiorari and exercising jurisdiction under the state of the record. Primarily the contentions between the parties upon this record at this time are of such uncertainty and so subject to change as to lack "ripeness" for determination and by such failure further do not constitute such "case of controversy" or "actual controversy" as to justify the exercise of jurisdiction. The relief sought by Petitioner should further be denied because the opinion of the Court of Civil Appeals below is clearly correct.

STATUTORY PROVISIONS INVOLVED

The statutory provision primarily involved is the Federal Highway Beautification Act, 23 U.S.C. §131.

The most significant provisions of involved statutes and ordinances are set forth in Petitioner's Petition for Writ of Certiorari, pp. 3-4.

STATEMENT OF THE CASE

This case involved the validity of Ordinance No. 7084, effective by its terms on the 19th day of July, 1975, a complete amendment and reenactment of the comprehensive zoning ordinance of the City of Lubbock, Texas. The form of the controversy was an action for declaratory judgment under state statute. Respondents here were among the defendants in the Trial Court. The Attorney General of the State of Texas, was also a defendant in the Trial Court, appearing and participating there by his Assistants Attorney General. The Attorney General has not participated at the appellate level actively.

By its original and supplemental pleadings some 23 separate claims for relief were raised by Petitioner in the Trial Court, challenging the validity of the regulations contained in Ordinance No. 7084, as they affect what are commonly called "billboards."

The District Court by its Judgment on April 1, 1977, upheld in all respects the specific provisions of the Ordinance insofar as they regulated those "billboards" installed *after* the effective date of the Ordinance. This ruling was affirmed by the Court of Civil Appeals below over Petitioner's challenge as Appellant. Petitioner does not seem to be raising any question as to that aspect of the opinion here.

The District Court judgment also, however, ruled that insofar as the Ordinance required all billboards *in existence on July 19, 1975*, to be brought into compliance or removed by January 1, 1982, that such

latter provisions were unreasonable, unconstitutional and void. This and related rulings were reversed and rendered by the Court of Civil Appeals in accordance with Respondents' challenge also as Appellant. All parties appeared in the Court of Civil Appeals as both Appellants and Appellees.

Respondents, of course, attempted no further appeals. Petitioner, after overruling of its motion for rehearing in the Court of Civil Appeals, filed its application for writ of error to the Supreme Court of Texas in timely order. This application was refused, no reversible error, as was Petitioner's motion for rehearing.

The material facts in this case as here material are stated in the opinion of the Court of Civil Appeals.

QUESTIONS PRESENTED

Respondents raise as here material one question as to the propriety of granting Petitioner's Petition for Writ of Certiorari, and two additional questions conditionally applicable only if the Petition be granted, as follows:

QUESTION ONE: Whether this Court should decline jurisdiction as to relief sought by Petitioner since the matters in issue have been vested administratively, and such issues are so contingent, uncertain and subject to change as not to constitute a "case of controversy" or an "actual controversy"?

QUESTION TWO: Does the 1978 amendment to 23 U.S.C. §131, require a declaration that the Respondent must actually pay for removal of billboards on interstate or primary systems in lieu of amortization (or subject the State of Texas to a 10% penalty in its federal highway fund allocation)?

QUESTION THREE: Whether amortization can substitute for "just compensation" requirements of the constitution, and even where the amortization period is less than the economic or physical life of the structure subjected to amortization, without constituting a constitutionally prohibited "taking"?

ARGUMENTS UNDER QUESTION ONE

I. This Court should decline to exercise jurisdiction as to the relief sought by Petitioner since the determinations here sought have been vested in administrative procedure as yet unaccomplished.

The primary contention of the Respondents in opposition to the Petition for Writ of Certiorari, is that even were we to assume *in arguendo* the merit of the Petitioner's argument as to the effect of the 1978 amendment to 23 U.S.C. §131, the controversy presented would not have attained such a degree of "ripeness" for adjudication as would justify the declaratory remedy they now seek. They seek not only the declaration that the amended compensation requirements will eliminate amortization as "effective control" under the statute, but also that the Court impose the 10% funding penalty of the statute upon the State of Texas. Respondents would suggest that jurisdiction as to such issues should be declined by the Court at this time.

The determinations sought by Petitioner are vested specifically in the Secretary (of the Department of Transportation) under 23 U.S.C. §131(1). Appeal from those decisions when made are also provided.

It will not be enough for Petitioner to respond by saying that this is a legal question and no discretion of decision as to "effective control" is left in the administrator. However, judicial challenge should be limited to review of actual agency action, without speculation about the validity of alternative actions the agency might have taken. *California Bankers Assn. v. Shultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974). Also, even should there in law be no option to the Secretary as to the course his action must follow, he is nonetheless authorized "wherever he determines it to be in the public interest" to *suspend* the application of 10% penalty of 23 U.S.C. §131(b), "for such periods as he deems necessary . . ."

Even if the Secretary decides upon application immediately for the penalty, the remedy sought by Petitioner here would deny to Respondents the opportunity for implementation of an *acceptable* remedial alternative as allowed by the procedural provisions in 23 U.S.C. §131(1).

Volumes have been written, and in general agreement, that Courts should await the attainment of some degree of finality by the administrative agency involved before intruding into ongoing processes of either general rule-making or specific enforcement. Davis, *Administrative Law Treatise*, 1958, and Supp., 1970, Ch. 21, further Supp. 1976, *Administrative Law of the Seventies*, Ch. 20-21; Mezines, Stein & Gruff, Vol. 5, *Administrative Law*, §§ 47.01-47.03, 48.01-48.04.

The rationale of this reticence to intrude in the administrative process is perhaps most definitively stated in *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969):

> "A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.
>
> "Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else

has clearly exceeded its jurisdiction. As Professor Jaffe puts it, '(t)he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy.' This reason is particular pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise.

" ***(J)udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

No hardship will result to Petitioner by allowing the administrative course to run. To the contrary, a decision now would foreclose to Respondents and the State of Texas the significant rights that can only be afforded by the cited administrative procedures; including a determination as would eliminate any need for judicial review.

II. Because of the existence of contingent and uncertain facts still subject to change no such "case" or "controversy" exists as would vest this Court with jurisdiction under the constitution nor "a case of actual controversy" under the Declaratory Judgments Act.

Article III, Section 2, of the United States Constitution limits federal court jurisdiction to act only to "cases" or "controversies." Even The Declaratory Judgment Act applies only in "a case of actual controversy." 28 U.S.C. §2201.[1]

These constitutional and statutory requirements were early defined in *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937):

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. * * * A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. * * * The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion ad-

[1]Petitioner sought declaratory relief in the state courts under state statute as here material substantially similar to 28 U.S.C. §2201. The Petition for Writ of Certiorari also requests that its 'rights" be here "declared". Since the procedural remedy of declaratory relief is by §2201 available to "any court of the United States," Respondents do not here challenge the theoretical availability of the remedy, only that it has no application in this case due to contingent and uncertain nature of the facts upon the record.

> vising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. * * * And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required."

This is at best a general statement, but it does outline the perimeters of the inquiry. Subsequent cases both on the constitutional and statutory consideration reflect that no precise test exists and that ultimately it is a question of degree and a "case by case" determination controls. *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Whether it be entitled "standing" or "ripeness" a "case" or "controversy" or "actual controversy" the same standard seems applicable. Does a *real* controversy exist, are the facts *finally* established, and what hardships might result from abstinance from decision?

Even assuming *in arguendo* the validity of Petitioner's arguments as to the effect upon amortization of the 1978 amendments to 23 U.S.C. §131, the jurisdictional standards are not attained:

1. Petitioner concedes (at page 8 of Petition) that "the exact number of billboards that remain at the end of the amortization period cannot be known until the end of the period",[2] but even that is a more positive conclusion than the record justifies.

The Petitioner itself acknowledges (as spread widely over the record) its 20% attrition rate arising from factors of development beyond any effect from the challenged ordinance.

It is also clear under 23 U.S.C. §131, that its proscriptions apply only to the federal "Interstate" and "Primary" Systems. City streets not so designated remain exclusively subject to the control of the Home Rule Municipality in Texas under Vernon's Ann.Civ. St. art 1175. We are unable at this time to even identify what highways within the City of Lubbock, *if any*, will remain as part of either the "Interstate" or "Primary" Systems on the January 1, 1982, removal date.

By instrument entitled "STIPULATIONS" entered over signature of counsel for all parties in the Trial Court and appearing in the TRANSCRIPT, pages 55-60, it was recognized in paragraph 2(a), that Interstate and Primary Systems as they *then* (at time of stipulation) existed "may be subsequently expanded, reduced or otherwise modified as to number and extent of the roadways involved by subsequent agreements

[2] Under the challenged ordinance compliance or removal of non-complying billboards is not required until January 1, 1982.

between the governmental entities involved."[8]

2. Beyond this one need only look briefly at the legislative history of treatment of 23 U.S.C. §131, and its massive repeated amendment where apparently only three of its current 17 sub-sections have survived the fourteen years from the original enactment, to be creditably uncertain whether any provision existing today will remain on January 1, 1982.

3. Another uncertainty absent any evidence in the record is the subject matter of use of the individual billboards as they will exist on the compliance or removal date. The challenged ordinance does *not* deal with subject matter. If Petitioner be right in contending that the 1978 amendment of §131(g) eliminates amortization of just compensation along the "Interstate" or "Primary" Systems, nonetheless even the §131(g) dictates apply only for removals where the billboard was "not permitted under sub-section (c) of this section." There are five categories of signs defined in said §131(c) itself as not prohibited by its limitations, all arising from the actual subject matter or message appearing on the display devise involved. Thus §131(g) burdens, even if as heavy as Petitioner maintains, will not apply if the subject matter of the

[8]In fact the areas designated by the exhibit attached to the Stipulations were changed by subsequent agreement effective shortly after presentation of evidence in the Trial Court. Under the modification now only about 40 miles out of nearly 1,000 miles of streets and highways within the corporate limits are now designated as part of the Interstate or Primary Systems. No effort will be made now to establish this factual change in the record since the designations may well be again modified prior to the January 1, 1982, removal or compliance date.

display on January 1, 1982, is and remains of one of the five protected categories.

4. Still another uncertainty belying the need for current adjudication is the length factor itself of the 6½ year amortization period of the ordinance. The duties of the State of Texas as to requiring compliance with the Highway Beautification Act is a separate primary responsibility. The responsibility of the State of Texas to enforce removal of non-complying billboards under 23 U.S.C. §131, was shown by agreements between the State and the Department of Transportation attached as Exhibit "F" to the STIPULATIONS of the parties in the Trial Court (Transcript pages 55-60). The surrender by the City of Lubbock as a municipality of all use power and authority to act *under the highway beautification statutes*, is also reflected by Exhibit "G" to such STIPLATIONS. The burdens of the State of Texas as a separate entity under the statutory and contractural agreements to secure compliance or removal of statute-offending billboards *within five years*. 23 U.S.C. 131(c), (b) and (c). This responsibility of the State of Texas maturing within five (5) years as to all billboards in existence on the effective date of the ordinance (July 19, 1976) should be due and completed long before the effective 6½ year "grace" period of the ordinance has run. We properly and legally assume that the contractural duties of the State of Texas toward removal will be performed under the contract with the Department of Transportation, if only to the standards approved as "effective control" by such agreements.

The so-called "bottom line" in this case from all this is that we cannot until January 1, 1982, identify one single specific billboard, or even to any degree of certainty ascertain that there will remain any single affected billboard, at such time to be subject to Petitioner's interpretations of the 1978 amendments.

This tenuous, speculative and uncertain mere possibility does not constitute or reach the dignity of either a "case" or "controversy" or "an actual controversy' for either constitutional jurisdiction or the application of declaratory remedies.

ARGUMENTS UNDER QUESTION TWO

The subjects for consideration here under QUESTION TWO are substantially the same matter as raised under Petitioners Question Presented No. 1.

I. The issues of "effective control" and 10% penalties are matters vested by the statute for administrative determination and processing.

The issue as to the 10% penalty has been covered above, noting generally the express delegation to the Secretary of the Department of Transportation of that determination, his power to suspend it, and other prerequisite procedures leading ultimately to judicial review. Respondents, in the interest of brevity, adopt again that discussion at this point, applying it specifically as to this issue as to the merits.

II. The burden of the 1978 amendment to 23 U.S.C. §131 is upon the state, not a limitation upon the municipality, and imposes only liability for payment of compensation not authority to act.

Respondents simply submit that Petitioner has simply expanded the area of interpretation of the 1978 amendment to 23 U.S.C., §131 beyond the "evil' it was designed to eliminate.

The very appendix notes on legislative history attached to Petitioner's brief shows the action to be remedied was conduct by the States in "hanging back" until municipalities had acted either under beautification authority or other police power authority. This is not a circumstance in the instant case, for here the City "hung back" by enacting a 6½ year "grace" period as against the five year removal duty on the State of Texas.

It was noted specifically at Petitioner's Application, APPENDIX C3 that "the State should not be able to avoid payment of just compensation by waiting for local political subdivisions to remove nonconforming signs under general zoning ordinances."

Viewed in this light the limitations of the amendment burdens the State with "just compensation" responsibilities, not the acting municipality, and does not reach the issue of the municipality authority to act. The liability is, that if we act municipally, as to billboard "nonconforming" under §131(c), then the "just compensation" burden is placed *on the State.*

The only actual limitation on the "authority" to remove itself remains unchanged in §131(n), but this

applies still only to advertising required to be removed *"under this section."*

The municipality's authority to act under general zoning authority is not accordingly effected. The only result is that municipal action will apparently create liability in the part of the State to pay "just compensation" as a result of our zoning-ordinance removal. It is only if the State were *subsequently* to refuse to pay this liability that the issue of "effective control" would be reached!

But this is all an exercise in futility, because the "just compensation" provisions would apply even to require State payment if the billboards were "nonconforming" under §131. If they are "non-conforming" then the State of Texas had an independent duty to cause the removal both under the statute itself and its contractual obligations with the Department of Transportation, and this duty matures within five years long before the 6½ year "grace" period of the zoning ordinance expires! We think at law it may be presumed that the State of Texas will comply with its statutory and contractual duties and remove all "non-conforming" signs. No one below has even suggested the contrary. Admittedly under the contractural agreements only signs on interstate and primary systems in violation of specific standards therein contained will be removed, and only a cursory review of the contracts raises the obvious conclusion that not all bilboards will be affected by those rather mild standards. But those that may remain after application of the contract standards will then not be

"nonconforming" and by that not subject to the "just compensation" requirements of §131(g).

The only area of remaining uncertainty will arise under adoption of "customary" standards under §131 (d), but the prerequisites either of adoption or non-adoption of §131(d) are not reflected in the record in this case. As to these latter customary standards there is further no evidence in the record sufficient to establish which, *if any*, billboards will remain on January 1, 1982, as would be subject to the apparent intent of the legislature in the 1978 amendment that compensation be paid for billboards which were or could be customary under §131(d).

Even as to this latter possibility, however, a "case" or "controversy" or "an actual controversy" will not arise unless and until after January 1, 1982, any such customary billboard actually existed *and then remains*, and if the ordinance was *then* applied as to compel removal without payment of just compensation by the State of Texas (or the City of Lubbock). These contingencies are far beyond a real controversy of immediate application. It is, indeed, far beyond anything but wild speculation.

III. "Just compensation" is never reached without first satisfying prerequisite condition of lawful erection.

In construing §131 or any other statute, we look to the purpose of the entire statute. "We must not be guided by a single sentence but look to the provisions of the law as a whole, and to its object and

policy." *Allied Chemical and Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 185, 92 S.Ct. 383, 400, 30 L.Ed.3d 341 (1971); *Richards v. U.S.*, 369 U.S.1, 11, 82 S.Ct. 585, 592, 7 L.Ed.2d 492 (1962); *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 288, 77 S.Ct. 330, 334, 1 L.Ed.2d 331 (1957); *Mastro Plastics Corp, v. N.L.R.B.*, 350 U.S. 270, 285, 76 S.Ct. 339, 359, 100 L.Ed. 309 (1956). As stated in *Kokoszka v. Belford*, 417 U.S. 642, 94 S.Ct. 2431 (1974):

> "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into the execution the will of the Legislature . . .' *Brown v. Buchesne*, 19 How. 183, 60 U.S. 183, 194, 15 L.Ed. 595 (1857)."

The requirement before compensation is due that the billboard in issue be "lawfully erected" has survived in 23 U.S.C. §131 from its inception. It is a condition of compensation under §131(g) and a condition to "effective control" under §131(c). Even the 1978 amendment which removed the words "under this section" from the earlier phrase "just compensation shall be paid for signs removed under this section" and replaced it with "whether or not removed under this section", reaffirmed the "lawfully erected under State law" as a prerequisite *in addition to* the "nonconforming" factor.

The parties stipulated that at least a sufficient

number of existing billboards had been lawfully erected under original permits, etc., to raise all legal questions in this case. The stipulation was not "open-ended" however.

No limitations appear from legislative intent as would force or compel a limited meaning to the word "lawfully erect" as would limit it to the time of original physical construction only. Otherwise a sign originally valid that became unlawful prior even to the date of the original enactment of 23 U.S.C. §131, would have to be construed as again made lawful by the Act. Nothing in the history of §131 supports that construction. It is also evident since the phrase "lawfully erect" was in the original language of the act itself that it must draw its meaning from other sources or powers. Indeed to equate "lawfully erect" with "lawful" under §131 would be more destructive of Petitioner's contentions than anything Respondent's have urged at any point in this brief.

The result is that "lawfully erected" must include both original construction *and* status *at the time* the specific provision of §131 *first* applied to it.

Respondent's have no quarrel with the cases as to intent cited on page 15 of Petitioner's brief, so long as they are limited to the specific circumstances with which they dealt. The office of subsequent declarations as to its prior intent by the legislature is at least persuasive as to what that prior intent actually was, where the original history is "dim." But legislative history is "history", and while it may be subsequently regretted it cannot be retroactively changed.

The legislative history upon the original enactment of §131 is overwhelming that until the 1978 amendment, if then even, no possible limitation upon the use of amortization as a tool under *zoning* even as against billboards on Interstate and Primary System existed, and specifically at the time of original enactment of §131. This was made so certain by repeated statements by the sponsors and floor-managers of the original Act as to defy denial now. H. Rpt. #89-1084, 89th Congress, 1st Session (1965); S. Rpt. #89-709, 89th Congress, 1st Session (1965); 111 Cong. Rec. 23869, 89th Cong., (Sept. 15, 1965); 111 Cong. Rec. 23879, 89th Cong., (Sept. 15, 1965); 111 Cong. Rec. 26264, 89th Cong., (Oct. 7, 1965); 111 Cong. Rec. 26320, 89th Cong., (Oct. 7, 1965); 111 Cong. Rec. 26265, 89th Cong., (Oct. 7, 1965); 111 Cong. Rec. 23878, 89th Cong., (Sept. 15, 1965).

Amortization *was* rejected even in 1965 for signs removed *under the provisions* of §131. Respondents have never contended to the contrary. It is to that issue and time only however, which the 1976 statements as to prior legislative intent set out under Section 116, in 1978 (Petitioner's Application Appendix, C2-C7), have application.

The result is that by the first date one could even claim some limitation as to amortization under general zoning laws in lieu of cash payment upon removal might have become effective, was upon the effective date of the 1978 amendments. By that time, however, the challenged ordinance (enacted in 1975) was already in effect and by that ordinance billboards

existing at that time were no longer "lawfully erected." They remained within the "grace" period but they were no longer "lawfully erected." The result is that they were by the other express limitation of §131(g) excused for "just compensation" requirements of the 1978 amendment.

IV. The term "just compensation" as used in 23 U.S.C. §131, was intended to have the same meaning as in a constitutional sense.

The only repudiation of amortization in this history of 23 U.S.C. §131, is that cited (from 1965) on page 16, Petitioner's Application. It was equally clear from the legislative history of that same time, that in so far as separated execution of authority other than under the Highway Beautification Act specifically, that amortization remained a viable form of just compensation.

The term "just compensation" is a term of long-standing legal meaning under constitutional interpretations. It was this recognized legal term adopted by the legislature for application in §131. True, the legislature rejected "amortization" as *the sole* method of compensation in 1965, but this is not and was not a rejection of "amortization" where the issue of "just compensation" was involved, as an avenue or part thereof.

The term "just compensation" has recognized legal meaning and had recognized legal meaning when incorporated in §131. Resort to dictionary definitions of "just," "compensation," etc., is not required.

"Just compensation" as legally defined, is also due only where a "taking" is incurred under §131(g). We turn to those questions in the following final question of this Respondent's Opposition.

ARGUMENTS UNDER QUESTION THREE

I. Amortization can substitute for the "just compensation" requirements of the constitution, and even where the amortization period is less than the economic or physical life of the structure subjected to amortization, since there is no "taking."

This generally is the counterpoint to Petitioner Question Presented No. 2.

The basic premise is that "just compensation" only becomes applicable when there is a "taking." That is the condition of the Constitution itself.

There is simply not a legally significant difference between existing and prospective uses of land; and the required termination of a pre-existing land use, with allowance for recoupment, is no different in kind from restrictions upon future land use alternatives. The result is that a "taking" in the eminent domain and constitutional sense does not result when the action is but an exercise of the police power in the public interest. And enactment requiring termination is subject only to the same tests of validity as other legislative acts, that is, whether it is reasonable and bears a fair relationship to the object sought to be obtained. *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596

(1906); *City of University Park v. Benners*, 485 S.W.2d 773 (Tex.Sup., 1972).

It has been repeatedly held that there are strong policy arguments and a demonstrable public need for the fair and reasonable termination of nonconforming property uses which most often do not disappear but tend to thrive in monopolistic positions in the community. Accordingly, municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of the police power; and property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Otherwise, a lawful exercise of the police power by the governing body of the City would be precluded. *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950) cert. den. 340 U.S.892, 71 S.Ct. 208, 95 L.Ed. 647; *City of University Park v. Benners*, supra.

II. With no "constitutionally" protected property right, there is no "taking."

We never accordingly reach the legal question as to lack of "just compensation" in the absence of a "taking."

Decisions in other jurisdictions upholding the validity of amortization provisions are cited in the opinion below. For brevity we adopt those citations here by reference.

Petitioner attempts to raise its constitutional issue by reference to a conclusion of massive effect of the

ordinance upon them. This is illusory. First because the extent of the effect upon them is but their conclusion which the Court below obviously did not feel constrained to follow under the evidence below. The second weakness is that even this conclusion is based not only upon the termination effect alone but also upon the effect from the regulations even as to signs erected *after* the effective date of the challenged ordinance. They have abandoned those specific challenges by failure to bring them forward as Questions Presented in their Petition. There is simply no evidence below as to the effect upon their business *solely* from those regulations *here still* in issue.

At great length in the Trial Court Petitioner paraded witnesses as to the location requirements for a poster company's "plant" or inventory. This was not contested. But as to the initial conclusion as to whether they could stay in operation under even their own worse picture of their remaining sign locations, however, there appeared division among their own witnesses. All said they would be hurt, but at least one felt that while the remaining sites would only make sales more difficult, it would not make them impossible (S.F. pgs. 452-453), and any new location would be an improvement (S.F. pg. 453). Another (of their witnesses) felt their inventory would remain adequate (S.F. p. 469). The actual number of billboards that would have to be conformed or removed was also contested in the evidence (S.F. p. 1146). The only certainty in the evidence below was that under the normal attrition rate alone the dismal

figures Petitioner now purports to base its "taking" argument upon were at best speculative and as such clearly an "issuable fact" properly considered in the legislative enactment of the challenged ordinance.

Even as to this final question, because of the speculative nature of the ultimate effect upon Petitioner, if any, which cannot be determined until after January 1, 1982, the "case" or "controversy" and "actual controversy" arguments first raised in this instrument gain substance.

For this reason, this lack of "ripeness," we do not even reach the issue as here attempted to be raised.

This illusion of "confiscation" and massive effect is not one of first or even unique contention by Petitioner. One of the arguments raised in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016, in the 1926 decision was that the effect of the zoning ordinance then in issue there was so disasterous to the value of the property involved "so as to confiscate and destroy a great part of its value." A zoning ordinance may go too far, however, but the condemnation does not apparently rest on the depreciation of value caused, but upon the basis that because of its extreme nature the limitation "does not bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

It is a simple tenent of long standing that it is not an effective argument against a zoning ordinance,

otherwise valid, that it limits the use and depreciates the value of property, since the public health, safety morals, and the general welfare are superior in importance to the pecuniary profits of the individual owner. *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915); *Lombardo v. Dallas*, 73 S.W.2d 475 (Tex.Sup., 1934).

It is not the limitation, but only if the limitation becomes a "taking." For this reason *Almota Farmers E & W Co. v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973), has no relevance here. *Almota* was an eminent domain case, and therefore "assumed" a "taking" and only deals with the elements of value determination. It never reaches the preliminary issue of what would constitute a "taking."

Petitioner has cited *Penn Central Transp. Co. v. New York*, ... U.S. ....., 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). We gladly join in this citation and indeed, in the interests of brevity, adopt that opinion at this point in its entirety. Contrary to Petitioner's intimation, *Penn. Central Transp. Co. v. New York*, supra, under the state of this record is the Respondents' case!

While the challenged ordinance eliminates the secondary useage for billboards it leaves a multitude of other uses to the landowner. The removed billboard structure is not physically taken, but may be used in whole or part elsewhere. Other billboard sites are allowed under the ordinance not only now but prospectively under the evidence.

III. The determinations as to use and amortization period under the evidence were reasonable conclusions within the power of the legislative enactment of the challenged ordinance.

Both as to the elimination of billboards in certain areas and as to the amortization period itself, the evidence supports the opinion of the Court below, for the municipal legislative tribunal could *reasonably conclude*, and did, that the health, safety, morals or general welfare would be promoted by prohibiting particular contemplated uses of land. *Nectow v. City of Cambridge*, supra.; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987 (1962); *Penn. Central Transp. Co. v. New York*, supra.

There is no *physical invasion* of the Petitioner's property nor is it affirmatively put to any *use*. The circumstances of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), and similar cases, are not approached by the record below.

If there is any reasonable factual basis upon which legislation may constitutionally rest, the Court should assume that the legislature had such factual basis in mind and enacted the legislation pursuant thereto. *Goldblatt v. Town of Hempstead*, supra. The evidence in the record below even eliminates the need for that assumption.

Even at most Petitioners' contentions raise only debatable factors against the challenged ordinance. If the validity of an ordinance is debatable the ordinance must be sustained. *Standard Oil Co. v. City of Marys-*

ville, 279 U.S. 582, 49 S.Ct. 430; *Zahn, et. al. v. Board of Public Works of the City of Los Angeles*, 274 U.S. 325, 47 S.Ct. 594; *Village of Euclid v. Amber Realty Co.*, supra.

For brevity we adopt the statements in the opinion below as to the reasonable nature of the amortization period.

CONCLUSION

Respondents respectfully submit that the opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas was clearly correct in all material holdings subject to current jurisdiction; that the issues sought here for determination of Petitioner are not appropriate for current determination, and that such issues and relief under the circumstances are not such as for which this Court should exercise its jurisdiction.

WHEREFORE, Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the above and foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari, has been sent by U.S. Postal Service, properly addressed and with adequate postage affixed, to Mr. Donald M. Hunt, of Key, Carr, Evans & Fouts, P. O. Box 2585, Lubbock, Texas 79408, attorneys for Petitioner, on this the 13th day of June, 1979.

James P. Brewster
Of Counsel